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IN THE

Supreme Court of the United States

No._____

October Term, 1980

SOTERIOS and CATHARINE HANTZIS,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SOTERIOS and CATHARINE HANTZIS
Pro Se
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Boston, MA 02108
(617) 367-2435

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Questions Presented for Review

In order for a taxpayer to claim the expenses of temporary employment as a deduction on his personal income tax return, must he show a business connection not only to his temporary home but also to his permanent home?

May an appellate court substitute its own findings on factual questions for those of the tax court when the tax court's findings are supported by the evidence and are not clearly erroneous?

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above entitled case on January 7, 1981, motion for rehearing denied on January 28, 1981.

Reported Opinion

The opinion of the First Circuit Court of Appeals is reported at 638 F.2d 248 (1st Cir. 1981).

Grounds for Jurisdiction

The judgment sought to be reviewed is a decision of the United States Court of Appeals for the First Circuit, issued on January 7, 1981. A petition for rehearing was filed on January 21, 1981, and denied on January 28, 1981.

This court has jurisdiction to review the Judgment by a Writ of Certiorari under 28 U.S.C. section 1254(1).

Statute

26 U.S.C. section 162 Trade or Business Expenses

> *(a) In General.* There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including . . .
>
> (2) traveling expenses (including amounts for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business . . .

Statement of the Case

This Writ is sought to review a decision of the United States Court of Appeals for the First Circuit, reversing a judgment of the United States Tax Court in an action brought pursuant to 26 U.S.C. (hereinafter IRC) section 6213.

Since 1973 the petitioning taxpayers have resided in Boston, Massachusetts. For a ten week period during the summer of 1975 Mrs. Hantzis was employed as a legal clerk in New York City. From the outset this employment was understood by both the employer and employee to be temporary in nature. Because of this temporary employment, Mrs. Hantzis incurred travel expenses and living expenses which were duplicative of expenses incurred in connection with her Boston home. The petitioners deducted these expenses on their 1975 personal income tax return. The Commissioner disallowed this deduction on the ground that Mrs. Hantzis had not been away from home when the expenses were incurred. The Commissioner contended that New York City was Mrs. Hantzis' principal place of business and therefore her "home" for purposes of IRC section 162(a)(2).

A statutory notice of deficiency was issued by the Respondent and the taxpayers filed a timely petition for redetermination of the tax with the tax court.

After a trial on the merits, the tax court allowed the deduction and specifically held: a.) that the employment in question was temporary and not indefinite; b.) that the taxpayer was "away from home" when she incurred these expenses; and c.) that the travel and lodging expenses were incurred in pursuit of a trade or business.

The facts as found by the tax court in support of the disputed deduction are as follows:

Petitioners, husband and wife, have resided continuously in Boston, Massachusetts, since mid-1973. Petitioner Soterios Hantzis is a teacher; in 1975 he was a member of the faculty of Northeastern University in Boston. Mrs. Hantzis (sometimes hereinafter referred to as "petitioner") is now a lawyer, employed by the Commonwealth of Massachusetts.

Until about mid-1973 and for a number of years prior thereto, Mrs. Hantzis was at the University of California at Berkeley working towards a Ph.D. degree in philosophy. . . . In 1973 her husband "decided that he wished to return to Boston to settle down," and the petitioners left California.

In the fall of 1973 Mrs. Hantzis became a full-time student at the Harvard Law School in Cambridge, Massachusetts. During her second year in law school she sought unsuccessfully to obtain employment for the summer of 1975 with a Boston law firm. However, she did succeed in getting a summer job as a legal assistant in a New York law firm, and beginning in June of 1975 she became employed by that firm for a ten-week period. Her husband, who had a teaching schedule that summer at Northeastern University, continued to reside at their Boston home, but Mrs. Hantzis rented a small apartment in New York for this period. Her total expenses relating to her New York employment amounted to $3204, consisting of $124 for transportation between Boston and New York and $3080 for meals and lodging while in New York.

In addition to the judge's findings, certain additional facts were not disputed at trial. In particular the testimony of Mrs. Hantzis indicated:

> — that in her search for summer employment, she had interviewed with some twenty or thirty Boston law firms;
>
> — that had any of these firms offered her employment, she would have accepted it instead of going to New York;
>
> — that all of the initial interviews, including those for New York employment, were conducted at or near Harvard Law School in Cambridge; and
>
> — that at a later date when she was offered a permanent job in New York City, she did not accept it because of her wish to remain in Boston.

In its opinion, the tax court specifically rejected the respondent's claim that Mrs. Hantzis' "Tax home" was in New York City. It held that the taxpayer had a "bona fide home" in Boston and that the expenses in question represented "the duplication of living expenses for which the statute was intended to provide relief." Further it held that it would have been "unreasonable to expect her to move her permanent Boston home to New York merely because she had a ten week job."

The respondent Commissioner appealed this decision to the United States Court of Appeals for the First Circuit. At the appellate level, the Commissioner abandoned his contention that the "away from home" requirement had not been satisfied and instead urged that the deduction should not be allowed since the expenses were not incurred "in pursuit of a trade or business." In

making this argument, the government did not dispute that Mrs. Hantzis had gone to New York for business rather than for personal reasons. It argued instead that the taxpayer lacked a pre-existing trade or business in Boston in pursuit of which she had travelled to New York. Thus the government's argument imposed a whole new requirement on section 162(a)(2) deductions that they be not only in pursuit of business but also that the business in question be pre-established at the taxpayer's home base.

The first circuit rejected this contention on a number of grounds. First, in examining the cases cited by the commissioner it found no support for this additional requirement. Secondly, it considered the proposed requirement in relation to the statutory purpose of section 162(a)(2), namely that expenses be excludible from taxable income where they are necessary for producing that income. In the light of this purpose the court found no relevant distinction between a worker who, having worked in location A, accepted temporary employment in location B, and a worker who accepted temporary employment in location B having just entered the labor market. "In each case," the court reasoned, "the taxpayer's travel expenses would be costs of earning an income and not merely incidents of personal lifestyle." (Opinion, p. 7.) The court therefore concluded that "requiring that the finding of business exigency necessary to deductibility under section 162(a)(2) be predicated upon the prior existence of a trade or business would thus captiously restrict the meaning of 'in pursuit of trade or business.' " (Opinion, p. 7.)

Despite the first circuit's rejection of the government's contentions, it nevertheless disallowed the deduction. It reversed the finding of the tax court that the taxpayer's tax home was in Boston. In so holding it reasoned that the home of a taxpayer will be deemed to move to the place of temporary employment unless the taxpayer has a business purpose for maintaining his permanent home. Thus, it held:

> Only a taxpayer who lives one place, works another and has business ties to *both* (emphasis in original) is in the ambiguous situation that the temporary employment doctrine is designed to resolve. In such circumstances, unless his employment away from his usual home is temporary, a court can reasonably assume that the taxpayer has abandoned his business ties to that location and is left with only personal reasons for maintaining a residence there. Where only personal needs require that a travel expense be incurred, however, a taxpayer's home is defined so as to leave the expense subject to taxation. *See, supra.* Thus a taxpayer who pursues temporary employment away from the location of his usual residence but has no business connection with that location, is not "away from home for purposes of section 162(a)(2)." Opinion, p. 15.

The court concluded by stating that "Mrs. FHantzis had no business relation to Boston" (Opinion, p. 16) and that it therefore would leave to later cases the task of determining "what relation to a place is required under section 162(a)(2) for duplicative living expenses to be deductible." (Opinion, p. 16.)

The appellee taxpayers filed a Petition for Rehearing noting that the case had been decided on a ground which had been neither briefed nor argued by the parties. In their petition, the appellees argued that the court's decision would render non-deductible expenses which had previously been considered deductible under the decisions of four circuit courts of appeal, the tax court and under a Revenue Ruling of the Internal Revenue Service. In addition they contended that the court had employed an erroneous standard for review of factual findings by the tax court.

The Petition for Rehearing was summarily denied.

Summary of Argument

There are a number of factors present in this case which favor a grant of certiorari.

First, by holding that a taxpayer's home shifts to a place of temporary employment unless business exigencies require maintenance of the permanent home, the first circuit has misconceived the purpose and nature of the temporary employment expense doctrine and placed itself in direct conflict with every other circuit which has ruled on the deductibility of temporary employment expenses.

Secondly, the decision in this case totally disregards the fact finding role of the Tax Court as mandated by this Court in *Commissioner v. Flowers*, 326 U.S. 465 (1945). In *Flowers*, this Court stated that the location of a taxpayer's home under IRC 162(a)(2) is a factual question and that "the Tax Court's inferences and conclusions on such a factual matter should not be disturbed

by an appellate court." 326 U.S. at 470. In this case the first circuit not only reversed the tax court on this factual issue, it also appears to have overruled certain subsidiary findings of the trial judge even though these findings had clear support in the record.

Finally and most importantly the decision in this case will affect a large number of individual taxpayers. The opinion clearly applies not merely to students but to construction workers, performers and others who must from time to time accept temporary employment. By requiring a business nexus with the permanent home, the lower court has effectively ruled out the deductibility of temporary employment expenses for most of these taxpayers.

Argument

I. *The First Circuit Opinion is in Conflict With the Decisions of Four Other Circuits.*

IRC section 162(a)(2) allows a deduction for travelling expenses incurred while away from home in pursuit of business. There is a confusing array of cases under this section. However if one looks at results as opposed to reasoning a few crucial points are clearly established.

It is, for example, established that in allowing such deductions Congress did not intend to permit the deduction of ordinary commuting expenses merely because a taxpayer chooses for personal reasons to maintain his residence far from his place of employment. *Commissioner v. Flowers, supra.* Equally well established, however, is an exception to this rule which has been uniformly recognized by the tax court (see, eg.

Boyer v. Commissioner, 36 T.C.M. 1369 [1977]; *Rambo v. Commissioner*, 69 T.C. 920 [1978]; *Avery v. Commissioner*, 29 T.C.M. 1187 [1970] and *Dowd v. Commissioner*, 37 T.C. 399 [1961]) and the various circuit courts of appeal. See, eg. *Frederick v. United States*, 603 F. 2d 1292 (C.A. 8, 1979); *Six v. United States*, 450 F. 2d 66 (C.A. 2, 1971); *Burns v. Gray*, 287 F. 2d 698 (C.A. 6, 1961); *Wright v. Hartsell*, 305 F. 2d 221 (C.A. 9, 1962); and *Harvey v. Commissioner*, 283 F. 2d 491 (C.A. 9, 1960). See also, *Coburn v. Commissioner*, 138 F. 2d763 (C.A. 2, 1943). But see *Commissioner v. Janss*, 260 F. 2d 99 (C.A. 8, 1958). This exception to the *Flowers* doctrine permits a deduction where the taxpayer is employed away from his personal home for only a temporary period. This exception recognizes that it is unreasonable to expect taxpayers to move their homes for periods of short duration (see *Six, supra*, at 70) and relieves the economic burden of maintaining two households (see *Harvey, supra*, at 495).

The first circuit noted the existence of this exception but limited its application to those circumstances where the taxpayer has a business reason for maintaining his original home. In all other cases, the taxpayer's home is deemed to have moved to the place of temporary employment. By employing this "functional" definition of "home" the first circuit brings itself squarely into conflict with the second circuit which has held that in all situations "home" as employed in section 162(a)(2) means the taxpayer's actual residence.

The tax home question was considered by the second circuit in its comprehensive opinion in *Rosenspan v. United States*, 438 F. 2d 905 (C.A. 2, 1971), cert. den. 404 U.S. 864, reh. den. 404 U.S. 959. Rosenspan was a jewelry salesman who for some 300 days a year was on the road plying his trade. Five or six times a year he would return to New York, spending time at his employer's office cleaning his sample case, checking orders, discussing client's problems, and attending meetings. While in New York he stayed with his brother or at a hotel. His family lived in Brooklyn and he made efforts to get there whenever possible. The taxpayer argued that since the Commissioner frequently urged that "home" meant "principal place of employment" Rosenspan's home under section 162(a)(2) was New York City. The court (*per* Friendly, J.) rejected this argument saying:

> Proper analysis of this problem has been beclouded, and the government's position has been made more difficult than it need be, by the Commissioner's insistence that "home" means "business headquarters" despite the Supreme Court's having thrice declined to endorse this and its rejection by several courts of appeal (citations). When Congress uses such a non-technical word in a tax statute, presumably it wants administrators and courts to read it in the way that ordinary people would understand, and not "to draw on some unexpressed spirit outside the normal meanings of words." (citation) The construction which the Commissioner has long advocated not only violates this principle but is unnecessary for the protection of the revenue that he seeks. That purpose is served,

> without any such distortion of language, by the third condition laid down in *Flowers, supra*, 326 U.S. at 470, namely, "that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or his employer." 438 F. 2d at 910-911.

Judge Friendly's opinion in *Rosenspan* makes it clear that "home" is to be taken in its normal sense in all cases and not merely in the "no home to be away from" type of case. He distinguishes earlier cases which appeared to agree with the Commissioner's interpretation by saying:

> Since the Commissioner's definition of "home" as "business headquarters" will produce the same result as the third *Flowers* condition in the overwhelming bulk of cases under section 162(a)(2), courts have often fallen into the habit of referring to it as an alternate ground of decision as this court did in *O'Toole v. Commissioner*, 243 F. 2d 302 (1957), see fn. 3. But examination of the string of cases cited by plaintiff as endorsing the "business headquarter" test has revealed almost none, aside from the unique situations involving military personnel considered above, which cannot be explained on the basis that the taxpayer had no permanent residence, or was not away from it, or maintained it in a locale apart from where he regularly worked as a matter of business necessity. This principle likewise affords satisfactory rationale for the "temporary employment cases. . . . When an assignment is truly temporary, it would be unreasonable to expect a taxpayer to move his home, and the expenses are thus compelled by the 'exigencies of business.' " 438 F. 2d at 912.

The conflict between the first and second circuits does not merely involve a question of whether the word "home" should be taken in its ordinary usage or in a technical sense. The second circuit has also reached a different result concerning the deductibility of temporary employment expenses in a case factually similar to the case at bar. In *Six v. United States, supra*, the taxpayer Ethel Merman Six resided in Colorado with her husband who was headquartered there as the president of Continental Airlines. In the summer she negotiated a "run of the show" contract to appear in the Broadway production of "Gypsy." While in New York she lived in a furnished hotel apartment. Her employment continued from May 21, 1959, to March 25, 1961. Upon these facts the district court found that Mrs. Six' tax home was in New York. The second circuit reversed citing *Rosenspan* and saying:

> The standard is not that applied by the district court (ie. whether Miss Merman's principal place of business was in New York or Colorado) but whether she was entitled to treat Colorado as her personal residence during the period of her performance in "Gypsy," ie. whether under the circumstances, she should have been deemed to move her home as that word is normally understood to New York. . . . The key inquiry which must be made is whether under all the circumstances Miss Merman's residence in New York during 1959 may be viewed as temporary in nature or as sufficiently indefinite to expect that a reasonable person in her position would pull up stakes and make her permanent residence in New York. 450 F. 2d at 69

Thus, in cases of temporary employment, the sole question considered by the second circuit is whether under all the circumstances it would be reasonable to expect the taxpayer to move her home to her place of temporary employment. It is clearly not relevant in that circuit whether the taxpayer maintains her business ties to her home base. Indeed it does not appear that Mrs. Six had any business connection to her home in Colorado.

The eighth circuit is the only circuit to consider the temporary employment issue since *Six*. In *Frederick v. United States*, 603 F. 2d 1292 (1979), the taxpayer was a carpenter who was employed at a missile site for nearly three years. The decision is silent on what if any business relationships Frederick maintained with his home town during the employment in question. The sole matter considered relevant by the eighth circuit was whether under all the facts and circumstances it appeared "probable that a taxpayer's employment outside the area of his regular abode will be for a 'temporary' or 'short' period of time." 603 F. 2d at 1294. See also *Cockrell v. Commissioner*, 321 F. 2d 504 (C.A. 8, 1963); but see *Commissioner v. Janss, supra*. After determining that the district court's conclusion on this issue was not clearly erroneous, it upheld the deduction. While the eighth circuit declined to adopt the *Six* test of reasonableness it did observe that either test would reach the same result in the vast majority of cases. 603 F. 2d at 1295.

The sixth circuit (in *Burns v. Gray, supra*) and the ninth circuit (in *Wright v. Hartsell, supra*, and *Harvey v. Commissioner, supra*) have also allowed temporary employment expense deductions and neither has seen fit

to impose the additional requirement that there be business connections with both homes. In fact there is only one other case besides the present case in any of the circuits where a taxpayer was denied a deduction once the employment was found to be temporary.

Commissioner v. Janss, 260 F. 2d 99 (C.A. 8, 1958) involved a student who lived with his parents during the school year. During his summer vacation he journeyed to Alaska where he was employed as a construction worker. The job was arranged through one of his father's clients and there was no showing that he had made any attempt to seek employment closer to home. In disallowing the deduction, the eighth circuit held that the *Flowers* rationale applied to cases of temporary employment. Thus the court ruled that no temporary employment expense could be deducted unless the taxpayer could show that recruitment of the temporary employee was related to the business purposes of the employer.

The precedential value of *Janss* must be seriously questioned in the light of later eight circuit decisions such as *Frederick, supra*, and *Cockrell, supra*. Nevertheless there are important factual differences between *Janss* and the present case. First, it appears probable that Janss' trip to Alaska was motivated by personal rather than business considerations. The record in this case clearly indicates the opposite. For example, Mrs. Hantzis testified that she had attempted to find employment in Boston and would have accepted employment in Boston had it been offered. Further, while in New York she worked ten to twelve hours a day and returned to Boston on most weekends to attend to personal responsibilities. In view of such testimony, the

trial judge's finding that she did not go to New York for personal reasons is obviously correct.

A second distinction between this case and *Janss* can be made on the basis of the *Six* test of reasonableness and is perhaps a reason for prefering the analysis employed in that case by the second circuit. It may well be reasonable to consider that a single taxpayer residing rent free in his parent's home has moved his home even when his employment at another location is obviously temporary. Denial of the deduction in the *Janss* case may be appropriate precisely because he incurred none of the economic burden for which the deduction was intended to provide relief.

II. *The First Circuit Employed An Erroneous Standard of Review in Reversing the Tax Court.*

This court has once before been faced with the tax home issue. *Flowers v. Commissioner, supra.* The Court in *Flowers* declined to embrace a technical definition of "home" and instead held that the location of a taxpayer's home for purposes of section 162(a)(2) is ordinarily one of fact to be determined by the trial judge. Thus, this court stated that "the Tax Court's inferences and conclusions on such a factual matter should not be disturbed by an appellate court." 326 U.S. at 470.

A similar concern that appellate courts apply the appropriate standard of review for factual questions under 162(a)(2) is evident in this Court's *per curiam* opinion in *Peurifoy v. Commissioner*, 358 U.S. 59 (1958). In that case the Court upheld the decision of the fourth circuit only after satisfying itself that the circuit court's reversal of the tax court was justified by a "fair assessment of the record." 358 U.S. at 61.

Indeed the present case amply demonstrates the wisdom of the Court's approach. The first circuit opinion explicitly recognizes the difficulty of formulating a broad or general interpretation of the "away from home" requirement in the face of "the almost infinite variety of factual situations involved." (Opinion, p. 10; see also p. 12.) For this reason, it adopts a "functional" interpretation of the term "home" the specifics of which are left to a case by case adjudication at the appellate level. While such definitional flexibility may be desirable in certain kinds of cases, it makes little sense in an area where the amounts of money involved are typically small in relation to the costs of appellate litigation. (In this case for example the assessment on the taxpayers solely for the duplication of the government's appellate briefs represents over 40% of the total amount in issue.) To rule for claims of such small size that there must be appellate adjudication of what are essentially factual questions is surely a wasteful judicial policy.

Further an appellate court is obviously hampered in redetermining factual questions by its absence from trial testimony. Deductibility under section 162(a)(2) hinges on such subtle factual issues as purpose, motivation and the reasonableness of maintaining one's permanent residence. The trial judge who hears the testimony is surely in a better position to assess these issues than an appellate court armed with only a broad outline of the facts. This is well illustrated by the first circuit's opinion in this case. On at least four separate occasions, it states that Mrs. Hantzis had no business connection with her Boston home. (Opinion pp. 12, 13, 15, and 16.) Yet the record indicated that there were at least two such connections — employment contacts for the sum-

mer in question occurred there and the taxpayer was subsequently employed in that area.

In this case, the tax court found that the taxpayer's home for purposes of section 162(a)(2) was Boston. For this finding there was clear support in the record. Nevertheless the first circuit reversed this finding by ruling that Boston could not be the taxpayer's home unless the further requirement was met that she have a business connection to that location. It must be noted that the factual nature of the tax home question is entirely eroded if appellate courts are free to reverse the determination of the tax court by engrafting "legal" requirements on such unambiguous terms as "home." As the eighth circuit has stated in a similar case:

> The determination of whether a job is temporary or indefinite is a factual question, and a court must examine all the facts and circumstances in reaching its conclusion. . . . The government's approach that one or two factors preclude deductibility as a matter of law would effectively foreclose this inquiry. *Frederick v. United States, supra*, 603 F. 2d at 1296.

The first circuit's reversal of the tax court was based upon the imposition of a legal prerequisite and not upon a fair assessment of the entire record. Thus the first circuit substituted its own factual finding for that of the trial judge and thereby employed an erroneous standard for review in complete disregard of the decisions of this Court.

III. *The First Circuit's Opinion Affects Many Taxpayers, Denying Them Deductions Which Were Previously Allowed by the I.R.S., the Tax Court and Four Circuit Courts of Appeal.*

On appeal the government contended both in their brief and in oral argument that the tax court opinion posed a serious threat to the revenue by opening the door to "wide spread abuse" by students seeking "to subsidize whatever travel adventures he or she can conjure up." The appeals court apparently believed that this threat was real. However, in its effort to close the door to this perceived potential for abuse, the opinion effectively ruled out the deduction not just for students but for construction workers, performers and others. These are deductions which even the Internal Revenue Service would concede as legitimate because taken by non-students.

The first circuit would allow a temporary employment expense deduction only where the taxpayers could demonstrate a business connection to his permanent home. This requirement reduces the temporary employment exception to a nullity because whether or not employment is temporary it is well established that if one has a business connection to two locations, the expenses of one of those locations are deductible. See, e.g. *Montgomery v. Commissioner*, 532 F. 2d 1088 (C.A. 6, 1976; and *Markey v. Commissioner*, 490 F. 2d 1249 (C.A. 6, 1974). The point of making an exception for temporary employment is that in such situations a taxpayer has little choice but to incur a duplicity of living expenses as a result of his employment. As the eighth circuit has recognized:

> The underlying premise is the idea that a taxpayer's choice of a residence is circumscribed by his expected term of employment. A taxpayer has considerable discretion in determining where he wants to live when he will be employed in a location for a substantial or indefinite period of time. This discretion is severely limited or nonexistent when a taxpayer will be employed for only a short or temporary period of time. Thus, the choice of a residence is a personal decision in the first situation, and a business decision in the latter. *Frederick v. United States, supra*, at 1295.

It must be noted that the considerations which make it reasonable for a taxpayer to maintain his personal home while temporarily employed in another city are economic as well as personal. Against the expenses of temporary residence must be weighed the alternative of incurring the expense of selling a home or breaking a lease, the expense of moving furniture and belongings, and the expense of obtaining a permanent home in the new city. The unreasonableness of incurring such expenses for a temporary stay is recognized in IRC section 217(c)(2), which disallows a moving expense deduction for stays of less than 39 weeks. Thus, if the first circuit's decision is allowed to stand, taxpayers in that circuit who accept temporary employment but who do not retain a business connection to their permanent homes will be in a double bind. If they don't move their permanent home, they will be denied a deduction for the expenses of their temporary residence. If they do move their permanent home, they will be denied a deduction of their moving expenses.

The first circuit opinion relies heavily upon the fact that Mrs. Hantzis had personal ties to her Boston home. But this factor will undoubtedly be present in the vast majority of temporary employment cases. Is a construction worker less entitled to this deduction because his wife and family are residing in the permanent home? According to the Internal Revenue Service, the answer is "no." In Revenue Ruling 60-189 (1960-1 Cum. Bull. 58) the I.R.S. reasoned that if a worker had left his family to pursue temporary employment, that fact would tend to support the deduction by creating a reasonable inference that the taxpayer accepted employment at a distant location for business rather than personal reasons:

> In the absence of clear evidence to the contrary, it is normally to be presumed from common experience that a man with a wife and children would prefer to work regularly in or near the locality where his family resides so that he may be with them during off-duty hours. That a worker has a family with a fixed residence should therefore tend to show that he takes jobs at distant points for business rather than for personal reasons. Should his case present the additional fact that there is a shortage of work in the locality where the family resides, or a shortage of sufficient work there to provide year-round employment, there would be even stronger reasons to conclude that the jobs are taken elsewhere for business rather than personal reasons.

Thus, in this ruling, the I.R.S. recognizes that the key inquiry in cases of temporary employment is whether that employment was undertaken for business or personal reasons. Given the record in this case there can be little doubt that Mrs. Hantzis reluctantly went to New

York solely because that was where employment was available.

The difficulty which this case has engendered is how to rule out the temporary employment deduction for student taxpayers and at the same time preserve sensible criteria for allowing it to others. One approach to this problem would be to hold in a direct but somewhat illogical fashion that a taxpayer is disqualified from taking this deduction if he or she has been a student during any portion of the tax year. A better approach, the petitioners respectfully suggest, would be to treat a student like any other taxpayer and allow the deduction where the facts and circumstances of his particular case indicate that the deduction is appropriate and not abusive.

The facts of this case do not support the notion that allowing students to claim temporary employment expenses will in each case represent an abuse of the deduction. It is a fundamental principle of income taxation that the expenses of producing income be allowed as a deduction. If this principle is not observed, the tax system would deter certain forms of legitimate economic activity. An analysis of the amounts involved in this case brings it squarely within these principles. In order to generate $3750 in gross income, Mrs. Hantzis incurred approximately $3200 in travel and duplicative living expenses. If the gross amount rather than the net is subjected to taxation, it would have been cheaper for her to forego her employment opportunity in New York.[1] Thus the taxpayers in this case are neither seeking a windfall nor, as the government has suggested, a tax

subsidy of their personal "adventures." It is not a tax subsidy when the full net amount of one's income is taxed. However if the first circuit decision is allowed to stand, the clear result is a tax penalty on gainful employment not only for these taxpayers, but for many others.

[1] It might be noted that this result is caused in part in this case by the fact that the tax law requires husband and wife to pool their income, thus subjecting them to higher rates of taxation. This rule reflects to some extent the old adage that two can live more cheaply than one. This assumption, however, obviously proves false where husband and wife are forced by the temporary employment of one spouse to maintain two separate households.

APPENDICES

United States Court of Appeals
For the First Circuit

No. 80-1140

SOTERIOS AND CATHARINE HANTZIS,

PETITIONERS, APPELLEES,

v.

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT, APPELLANT.

APPEAL FROM THE UNITED STATES TAX COURT

[HON. ARNOLD RAUM, *Judge*]

Before

CAMPBELL and BOWNES, *Circuit Judges*,
and KEETON,* *District Judge*.

James A. Riedy, Attorney, Tax Division, Department of Justice, with whom *M. Carr Ferguson*, Assistant Attorney General, *Gilbert E. Andrews* and *Jonathan S. Cohen*, Attorneys, Tax Division, Department of Justice, were on brief, for appellant.

Catharine W. Hantzis, pro se with whom *Soterios C. Hantzis* was on brief, pro se.

January 7, 1981

CAMPBELL, *Circuit Judge*. The Commissioner of Internal Revenue (Commissioner) appeals a decision of the United States Tax Court that allowed a deduction under 26 U.S.C. § 162(a)(2) (1976) for expenses incurred by a law student in the course of her summer employment. The facts in the case are straightforward and undisputed.

In the fall of 1973 Catharine Hantzis (taxpayer), formerly a candidate for an advanced degree in philosophy at the University of California at Berkeley, entered Harvard Law School in Cambridge, Massachusetts, as a full-time student. During her

* Of the District of Massachusetts, sitting by designation.

second year of law school she sought unsuccessfully to obtain employment for the summer of 1975 with a Boston law firm. She did, however, find a job as a legal assistant with a law firm in New York City, where she worked for ten weeks beginning in June 1975. Her husband, then a member of the faculty of Northeastern University with a teaching schedule for that summer, remained in Boston and lived at the couple's home there. At the time of the Tax Court's decision in this case, Mr. and Mrs. Hantzis still resided in Boston.

On their joint income tax return for 1975, Mr. and Mrs. Hantzis reported the earnings from taxpayer's summer employment ($3,750) and deducted the cost of transportation between Boston and New York, the cost of a small apartment rented by Mrs. Hantzis in New York and the cost of her meals in New York ($3,204). The deductions were taken under 26 U.S.C. § 162(a)(2) (1976), which provides:

> "§ 162. Trade or business expenses
>
> (a) In general. — There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including —
>
> * * * * * *
>
> (2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business . . . ."

The Commissioner disallowed the deduction on the ground that taxpayer's home for purposes of section 162(a)(2) was her place of employment and the cost of traveling to and living in New York was therefore not "incurred . . . while away from home." The Commissioner also argued that the expenses were not incurred "in the pursuit of a trade or business." Both positions were rejected by the Tax Court, which found that Boston was Mrs. Hantzis' home because her employment in New

York was only temporary and that her expenses in New York were "necessitated" by her employment there. The court thus held the expenses to be deductible under section 162(a)(2).[1]

In asking this court to reverse the Tax Court's allowance of the deduction, the Commissioner has contended that the expenses were not incurred "in the pursuit of a trade or business." We do not accept this argument; nonetheless, we sustain the Commissioner and deny the deduction, on the basis that the expenses were not incurred "while away from home."

I.

Section 262 of the Code, 26 U.S.C. § 262 (1976), declares that "except as otherwise provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." Section 162 provides less of an exception to this rule than it creates a separate category of deductible business expenses. This category manifests a fundamental principle of taxation: that a person's taxable income should not include the cost of producing that income. *See* Note, *The Additional Expense Test: A Proposal to Help Solve the Dilemma of Mixed Business and Personal Expenses*, 1974 Duke L.J. 636, 636. "[O]ne of the specific examples given by Congress" of a deductible cost of producing income is travel expenses in section 162(a)(2). *Commissioner* v. *Flowers*, 326 U.S. 465, 469 (1946). *See* Rev. Rul. 60-16, 1960-1 C.B. 58, 60.

The test by which "personal" travel expenses subject to tax under section 262 are distinguished from those costs of travel necessarily incurred to generate income is embodied in the requirement that, to be deductible under section 162(a)(2), an expense must be "incurred . . . in the pursuit of a trade or

[1] The court upheld the Commissioner's disallowance of a deduction taken by Mr. and Mrs. Hantzis on their 1975 return for expenses incurred by Mrs. Hantzis in attending a convention of the American Philosophical Association. Mr. and Mrs. Hantzis do not appeal that action.

business." In *Flowers* the Supreme Court read this phrase to mean that "[t]he exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors." 326 U.S. at 474.[2] Of course, not every travel expense resulting from business exigencies rather than personal choice is deductible; an expense must also be "ordinary and necessary" and incurred "while away from home." 26 U.S.C. § 162(a)(2) (1976); *Flowers*, 326 U.S. at 470. But the latter limitations draw also upon the basic concept that only expenses necessitated by business, as opposed to personal, demands may be excluded from the calculation of taxable income.

With these fundamentals in mind, we proceed to ask whether the cost of taxpayer's transportation to and from New York, and of her meals and lodging while in New York, was incurred "while away from home in the pursuit of a trade or business."

II.

The Commissioner has directed his argument at the meaning of "in pursuit of a trade or business." He interprets this phrase as requiring that a deductible traveling expense be incurred under the demands of a trade or business which predates the expense, *i.e.*, an "already existing" trade or business. Under this theory, section 162(a)(2) would invalidate the deduction taken by the taxpayer because she was a full-time student before commencing her summer work at a New York law firm in 1975 and so was not continuing in a trade or

[2] *Flowers* denied a deduction claimed by the taxpayer as not involving expenses required by the taxpayer's *employer's* business. It is now established, however, that a taxpayer may be in the trade or business of being an employee. *See, e.g., Primuth* v. *Commissioner*, 54 T.C. 374, 377-78 (1970) (citing cases); Rev. Rul. 77-16, 1977-1 C.B. 37; Rev. Rul. 60-16, 1960-1 C.B. 58. Thus, expenses necessitated by the exigencies of an employee's occupation, without regard to the demands of the employer's business, are also deductible.

business when she incurred the expenses of traveling to New York and living there while her job lasted.[3] The Commissioner's proposed interpretation erects at the threshold of deductibility under section 162(a)(2) the requirement that a taxpayer be engaged in a trade or business *before* incurring a travel expense. Only if that requirement is satisfied would an inquiry into the deductibility of an expense proceed to ask whether the expense was a result of business exigencies, incurred while away from home, and reasonable and necessary.

Such a reading of the statute is semantically possible and would perhaps expedite the disposition of certain cases.[4] Nevertheless, we reject it as unsupported by case law and inappropriate to the policies behind section 162(a)(2).

The two cases relied on by the Commissioner do not appear to us to establish that traveling expenses are deductible only if incurred in connection with a preexisting trade or business. The seminal interpretation of section 162(a)(2), *Flowers* v. *Commissioner*, *supra*, 326 U.S. 465, is as equivocal upon that point as the statutory language it construes. *Commissioner* v. *Janss*, 260 F.2d 99 (8th Cir. 1958), a case with facts somewhat

[3] The taxpayer has not argued that being a law student constitutes a trade or business and so we do not address the issue. *See generally Reisinger* v. *Commissioner*, 71 T.C. 568 (1979); Rev. Rul. 68-591, 1968-2 C.B. 73.

[4] We do not see, however, how it would affect the treatment of this case. The Commissioner apparently concedes that upon starting work in New York the taxpayer engaged in a trade or business. If we held — as we do not — that an expense is deductible only when incurred in connection with an already existing trade or business, our ruling would seem to invalidate merely the deduction of the cost of taxpayer's trip from Boston to New York to begin work (about $64). We would still need to determine, as in any other case under section 162(a)(2), whether the expenses that arose *subsequent* to the taxpayer's entry into her trade or business were reasonable and necessary, required by business exigencies and incurred while away from home.

akin to the present, did not articulate any such theory. In *Janss*, a college student from Des Moines, Iowa, worked in Alaska during the summer between his freshman and sophomore years of school and sought to deduct from his taxable income the cost of transportation to and from Alaska as well as the cost of meals and lodging while there. Despite testimony from the personnel manager of the construction company for which Janss worked indicating that workers were available in Alaska and that Janss had been employed there largely as a personal favor, the Tax Court allowed the deduction. The Eighth Circuit reversed. It held, under *Flowers*, that Janss' travel to Alaska was not motivated by the exigencies of the employer's business. 260 F.2d at 104. The Eighth Circuit placed no emphasis on the fact that Janss had no previously existing trade or business.[5]

Nor would the Commissioner's theory mesh with the policy behind section 162(a)(2). As discussed, the travel expense deduction is intended to exclude from taxable income a necessary cost of producing that income. Yet the recency of entry into a trade or business does not indicate that travel expenses are not a cost of producing income. To be sure, the costs incurred by a taxpayer who leaves his usual residence to begin a trade or business at another location may not be truly *travel* expenses, *i.e.*, expenses incurred while "away from home," *see infra*, but practically, they are as much incurred "in the pursuit of a trade or business" when the occupation is new as when it is old.

An example drawn from the Commissioner's argument illustrates the point. The Commissioner notes that "if a construction worker, who normally works in Boston for Corp. A, travels to New York to work for Corp. B for six months, he is

[5] The bulk of the opinion is devoted to rejecting the argument that in cases of temporary employment the "business exigencies" requirement of *Flowers* need not be satisfied. 260 F.2d at 101-03. This argument is made by the taxpayer in the present case and we consider it *infra*.

traveling . . . in the pursuit of his own trade as a construction worker." Accordingly, the requirement that travel expenses be a result of business exigencies is satisfied. Had a construction worker just entering the labor market followed the same course his expenses under the Commissioner's reasoning would not satisfy the business exigencies requirement.[6] Yet in each case, the taxpayer's travel expenses would be costs of earning an income and not merely incidents of personal lifestyle. Requiring that the finding of business exigency necessary to deductibility under section 162(a)(2) be predicated upon the prior existence of a trade or business would thus captiously restrict the meaning of "in pursuit of a trade or business."

Insofar as any cases bear on the issue, they seem to support this conclusion. In *United States* v. *LeBlanc*, 278 F.2d 571 (5th Cir. 1960), a justice of the Louisiana supreme court who resided in Napoleanville sought to deduct as a travel expense the cost of an apartment in New Orleans, where the court sat. Because Louisiana law required justices both to maintain a residence in their home districts and be present at court functions, the cost of the apartment was found to have been necessitated by business exigencies.[7] Such a result is inconsistent with the rule proposed by the Commissioner. The tax-

[6] It could be argued that people enter the trade or business of "being employees," *see supra*, upon becoming available for employment rather than upon actually starting work. If correct, the two hypothetical situations would not necessarily produce different results. So interpreted, however, the Commissioner's argument would create an administrative nightmare. In every case in which the issue arose, the Commissioner and the courts would be presented with the task of determining at just what point a person could be said to have actually entered his trade or business. Further, such a position might well imply that Mrs. Hantzis actually entered her trade or occupation while still in Boston, and not upon arriving at the offices of the New York firm.

[7] *Accord Emmert* v. *United States*, 146 F. Supp. 322 (S.D. Ind. 1955) (Indiana supreme court judge); *Moss* v. *United States*, 145 F. Supp. 10 (W.D.S.C. 1956) (public service commissioner). In cases where it was not shown that the law required maintaining two homes the deduction has been denied. *See Barnhill* v. *Commis-*

payer in *LeBlanc* was not previously engaged in the trade or business which he began upon arriving in New Orleans. At least for the period of his first term on the court, therefore, the taxpayer's expenses in New Orleans were not incurred in connection with an already existing occupation and so, by the Commissioner's reasoning, should have been disallowed.[8] In another case, *Kroll* v. *Commissioner*, 49 T.C. 557 (1968), the court expressly found that the taxpayer, an eight-year-old actor, was not engaged in an already existing trade or business. Indeed, before coming to New York to begin acting, he "had never engaged in a trade or business." 49 T.C. at 558. That this fact might have been dispositive was never mentioned by the court, which noted that the expenses in question were incurred in connection with an ongoing trade or business, *id.*, at 561, and so went on to address the requirement that they have arisen while away from home.

In other contexts the phrase "in the pursuit of a trade or business" may permit the interpretation urged upon us by the Commissioner,[9] but to require under section 162(a)(2) that a

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sioner, 148 F.2d 913 (4th Cir. 1945); *Montgomery* v. *Commissioner*, 64 T.C. 175, 182 (1975), *aff'd*, 532 F.2d 1088 (6th Cir. 1976); *Lindsay* v. *Commissioner*, 34 B.T.A. 840 (1936).

[8] The tax years at issue in *LeBlanc* were 1950 and 1951. The taxpayer began his tenure on the court in December 1949. 278 F.2d at 572. Thus, it could be argued that as of January 1, 1950 the taxpayer was engaged in a previously existing trade or business. This rationalization of the case exposes the weaknesses of the Commissioner's position. It is not clear to us why a month's prior employment would provide prima facie evidence of the business purpose behind the taxpayer's expenses. And if it did, the question would further arise how much previous work would constitute an already existing trade or business. A week? A day? A few hours on the train between Napoleanville and New Orleans? The difficulty in administering such a rule is obvious.

[9] Under the general provision of section 162(a), no deduction is allowed for expenses incurred in preparing to enter a new business and the phrase "in the pursuit of a trade or business" has in cases concerned with such expenses been read to "presuppose [ ] an

travel expense be incurred in connection with a preexisting trade or business is neither necessary nor appropriate to effectuating the purpose behind the use of that phrase in the provision. Accordingly, we turn to the question whether, in the absence of the Commissioner's proposed threshold limit on deductibility, the expenses at issue here satisfy the requirements of section 162(a)(2) as interpreted in *Flowers* v. *Commissioner*.

III.

As already noted, *Flowers* construed section 162(a)(2) to mean that a traveling expense is deductible only if it is (1) reasonable and necessary, (2) incurred while away from home, and (3) necessitated by the exigencies of business. Because the Commissioner does not suggest that Mrs. Hantzis' expenses were unreasonable or unnecessary, we may pass directly to the remaining requirements. Of these, we find dispositive the requirement that an expense be incurred while away from home. As we think Mrs. Hantzis' expenses were not so incurred, we hold the deduction to be improper.

The meaning of the term "home" in the travel expense provision is far from clear. When Congress enacted the travel expense deduction now codified as section 162(a)(2), it apparently was unsure whether, to be deductible, an expense must be incurred away from a person's residence or away from his principal place of business. *See* Note, *A House is not a Tax*

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existing business with which [the taxpayer] is connected." *Frank* v. *Commissioner*, 20 T.C. 511, 513-14 (1953). *See, e.g., Weinstein* v. *United States*, 420 F.2d 700 (Ct. Cl. 1970). Section 174 of the Internal Revenue Code, 26 U.S.C. § 174 (1976), which allows a deduction for "research or experimental expenditures . . . paid or incurred . . . in connection with [a taxpayer's] trade or business . . ." has been similarly construed. *See, e.g., Koons* v. *Commissioner*, 35 T.C. 1092, 1100-01 (1961). Neither provision is at issue here, nor particularly relevant.

Home, 49 Va. L. Rev. 125, 127-28 (1963). This ambiguity persists and courts, sometimes within a single circuit, have divided over the issue. *Compare Six* v. *United States*, 450 F.2d 66 (2d Cir. 1971) (home held to be residence) *and Rosenspan* v. *United States*, 438 F.2d 905 (2d Cir.), *cert. denied*, 404 U.S. 864 (1971) *and Burns* v. *Gray*, 287 F.2d 698 (6th Cir. 1961) *and Wallace* v. *Commissioner*, 144 F.2d 407 (9th Cir. 1944) *with Markey* v. *Commissioner*, 490 F.2d 1249 (6th Cir. 1974) (home held to be principal place of business) *and Curtis* v. *Commissioner*, 449 F.2d 225 (5th Cir. 1971) *and Wills* v. *Commissioner*, 411 F.2d 537 (9th Cir. 1969).[10] It has been suggested that these conflicting definitions are due to the enormous factual variety in the cases. *See Bell* v. *United States*, 591 F.2d 647, 649 (Ct. Cl. 1979) ("We believe that much of the problem in differing definitions is the result of attempting to conceptualize the reasons for decisions which are based on widely varying factual situations."); *Brandl* v. *Commissioner*, 513 F.2d 697, 699 (6th Cir. 1975) ("Because of the almost infinite variety of the factual situations involved, the courts have not formulated a concrete definition of the term 'home' capable of universal application.") We find this observation instructive, for if the cases that discuss the meaning of the term "home" in section 162(a)(2) are interpreted on the basis of their unique facts as well as the fundamental purposes of the travel expense provision, and not simply pinioned to one of two competing definitions of home, much of the seeming confusion and contradiction on this issue disappears and a functional definition of the term emerges.

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[10] The Tax Court has, with a notable exception, consistently held that a taxpayer's home is his place of business. *See Daly* v. *Commissioner*, 72 T.C. 190 (1979); *Foote* v. *Commissioner*, 67 T.C. 1 (1976); *Montgomery* v. *Commissioner*, 64 T.C. 175 (1975), *aff'd*. 532 F.2d 1088 (6th Cir. 1976); *Blatnick* v. *Commissioner*, 56 T.C. 1344 (1971). The exception, of course, is the present case.

We begin by recognizing that the location of a person's home for purposes of section 162(a)(2) becomes problematic only when the person lives one place and works another. Where a taxpayer resides and works at a single location, he is always home, however defined; and where a taxpayer is constantly on the move due to his work, he is never "away" from home. (In the latter situation, it may be said either that he has no residence to be away from, or else that his residence is always at his place of employment. *See* Rev. Rul. 60-16, 1960-1 C.B. 58, 62.) However, in the present case, the need to determine "home" is plainly before us, since the taxpayer resided in Boston and worked, albeit briefly, in New York.

We think the critical step in defining "home" in these situations is to recognize that the "while away from home" requirement has to be construed in light of the further requirement that the expense be the result of business exigencies. The traveling expense deduction obviously is not intended to exclude from taxation every expense incurred by a taxpayer who, in the course of business, maintains two homes. Section 162(a)(2) seeks rather "to mitigate the burden of the taxpayer who, *because of the exigencies of his trade or business, must* maintain two places of abode and thereby incur additional and duplicate living expenses." *Kroll, supra*, 49 T.C. at 562 (emphasis added). *See Brandl, supra*, 513 F.2d at 699; *Daly, supra*, 72 T.C. at 195. Consciously or unconsciously, courts have effectuated this policy in part through their interpretation of the term "home" in section 162(a)(2). Whether it is held in a particular decision that a taxpayer's home is his residence or his principal place of business, the ultimate allowance or disallowance of a deduction is a function of the court's assessment of the reason for a taxpayer's maintenance of two homes. If the reason is perceived to be personal, the taxpayer's home will generally be held to be his place of employment rather than his residence and the deduction will be denied. *See, e.g., Markey, supra*, 490 F.2d at 1252-55; *Wills, supra*, 411 F.2d

at 540-41; *Daly*, *supra*, 72 T.C. at 195-98; *Lindsay* v. *Commissioner*, *supra*, 34 B.T.A. at 843-44. If the reason is felt to be business exigencies, the person's home will usually be held to be his residence and the deduction will be allowed. *See, e.g.*, *Frederick* v. *United States*, 603 F.2d 1292 (8th Cir. 1979); *Wright* v. *Hartsell*, 305 F.2d 221 (9th Cir. 1962); *Harvey* v. *Commissioner*, 283 F.2d 491 (9th Cir. 1960); *LeBlanc*, *supra*, 278 F.2d 571. We understand the concern of the concurrence that such an operational interpretation of the term "home" is somewhat technical and perhaps untidy, in that it will not always afford bright line answers, but we doubt the ability of either the Commissioner or the courts to invent an unyielding formula that will make sense in all cases. The line between personal and business expenses winds through infininte factual permutations; effectuation of the travel expense provision requires that any principle of decision be flexible and sensitive to statutory policy.

Construing in the manner just described the requirement that an expense be incurred "while away from home," we do not believe this requirement was satisfied in this case. Mrs. Hantzis' *trade or business* did not require that she maintain a home in Boston as well as one in New York. Though she returned to Boston at various times during the period of her employment in New York, her visits were all for personal reasons. It is not contended that she had a business connection in Boston that necessitated her keeping a home there; no professional interest was served by maintenance of the Boston home — as would have been the case, for example, if Mrs. Hantzis had been a lawyer based in Boston with a New York client whom she was temporarily serving. The home in Boston was kept up for reasons involving Mr. Hantzis, but those reasons cannot substitute for a showing by *Mrs.* Hantzis that the exigencies of *her* trade or business required *her* to maintain two homes.[11] Mrs. Hantzis' decision to keep two homes must

[11] In this respect, Mr. and Mrs. Hantzis' situation is analogous to

be seen as a choice dictated by personal, albeit wholly reasonable, considerations and not a business or occupational necessity. We therefore hold that her home for purposes of section 162(a)(2) was New York and that the expenses at issue in this case were not incurred "while away from home."[12]

We are not dissuaded from this conclusion by the temporary nature of Mrs. Hantzis' employment in New York. Mrs. Hantzis argues that the brevity of her stay in New York excepts her from the business exigencies requirement of section 162(a)(2) under a doctrine supposedly enunciated by the Supreme Court in *Puerifoy* v. *Commissioner*, 358 U.S. 59 (1958) (per curiam).[13] The Tax Court here held that Boston was the tax-

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cases involving spouses with careers in different locations. Each must independently satisfy the requirement that deductions taken for travel expenses incurred in the pursuit of a trade or business arise while he or she is away from home. *See Chwalow* v. *Commissioner*, 470 F.2d 475, 477-78 (3d Cir. 1972) ("Where additional expenses are incurred because, for personal reasons, husband and wife maintain separate domiciles, no deduction is allowed."); *Hammond* v. *Commissioner*, 213 F.2d 43, 44 (5th Cir. 1954); *Foote* v. *Commissioner*, 67 T.C. 1 (1976); *Coerver* v. *Commissioner*, 36 T.C. 252 (1961). This is true even though the spouses file a joint return. *Chwalow*, *supra*, 470 F.2d at 478.

[12] The concurrence reaches the same result on essentially the same reasoning, but under what we take to be an interpretation of the "in pursuit of business" requirement. We differ from our colleague, it would seem, only on the question of which precondition to deductibility best accommodates the statutory concern for " 'the taxpayer who, because of the exigencies of his trade or business, must maintain two places of abode and thereby incur additional and duplicate living expenses.' " *See supra*. Neither the phrase "away from home" nor "in pursuit of business" effectuates this concern without interpretation that to some degree removes it from "the ordinary meaning of the term." (Keeton, J., concurring). However, of the two approaches, we find that of the concurrence more problematic than that adopted here.

[13] In *Peurifoy*, the Court stated that the Tax Court had "engrafted an exception" onto the requirement that travel expenses be dictated by business exigencies, allowing "a deduction for expenditures . . . when the taxpayer's employment is 'temporary' as contrasted with

payer's home because it would have been unreasonable for her to move her residence to New York for only ten weeks. At first glance these contentions may seem to find support in the court decisions holding that, when a taxpayer works for a limited time away from his usual home, section 162(a)(2) allows a deduction for the expense of maintaining a second home so long as the employment is "temporary" and not "indefinite" or "permanent." *See, e.g., Frederick, supra*, 603 F.2d at 1294; *Six, supra*, 450 F.2d at 69; *Wright, supra*, 304 F.2d at 224-25; *Coburn* v. *Commissioner*, 138 F.2d 763, 764-65 (2d Cir. 1943). This test is an elaboration of the requirements under section 162(a)(2) that an expense be incurred due to business exigencies and while away from home. *See* note 12, *supra*. Thus it has been said,

> "Where a taxpayer reasonably expects to be employed in a location for a substantial or indefinite period of time, the reasonable inference is that his choice of a residence is a personal decision, unrelated to any business necessity. Thus, it is irrelevant how far he travels to work. The

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'indefinite' or 'indeterminate.' " 358 U.S. at 59. Because the Commissioner did not challenge this exception, the Court did not rule on its validity. It instead upheld the circuit court's reversal of the Tax Court and disallowance of the deduction on the basis of the adequacy of the appellate court's review. The Supreme Court agreed that the Tax Court's finding as to the temporary nature of taxpayer's employment was clearly erroneous. *Id.* at 60-61.

Despite its inauspicious beginning, the exception has come to be generally accepted. Some uncertainty lingers, however, over whether the exception properly applies to the "business exigencies" or the "away from home" requirement. *Compare Brandl, supra*, 513 F.2d at 699 *and Blatnick* v. *Commissioner*, 56 T.C. 1344, 1348 (1971) *with Frederick, supra*, 603 F.2d at 1294. In fact, it is probably relevant to both. *See Six, supra*, 450 F.2d at 69 n.1; Note, *supra*, 49 Va. L. Rev. at 136-45.

Because we treat these requirements as inextricably intertwined, *see supra*, we find it unnecessary to address this question: applied to either requirement, the temporary employment doctrine affects the meaning of both.

> normal expectation, however, is that the taxpayer will choose to live near his place of employment. Consequently, when a taxpayer reasonable [sic] expects to be employed in a location for only a short or temporary period of time and travels a considerable distance to the location from his residence, it is unreasonable to assume that his choice of a residence is dictated by personal convenience. The reasonable inference is that he is temporarily making these travels because of a business necessity."

Frederick, supra, 603 F.2d at 1294-95 (citations omitted).

The temporary employment doctrine does not, however, purport to eliminate any requirement that continued maintenance of a first home have a business justification. We think the rule has no application where the taxpayer has no business connection with his usual place of residence. If no business exigency dictates the location of the taxpayer's usual residence, then the mere fact of his taking temporary employment elsewhere cannot supply a compelling business reason for continuing to maintain that residence. Only a taxpayer who lives one place, works another and has business ties to *both* is in the ambiguous situation that the temporary employment doctrine is designed to resolve. In such circumstances, unless his employment away from his usual home is temporary, a court can reasonably assume that the taxpayer has abandoned his business ties to that location and is left with only personal reasons for maintaining a residence there. Where only personal needs require that a travel expense be incurred, however, a taxpayer's home is defined so as to leave the expense subject to taxation. *See supra*. Thus, a taxpayer who pursues temporary employment away from the location of his usual residence, but has no business connection with that location, is not "away from home" for purposes of section 162(a)(2). *See Cockrell* v. *Commissioner*, 321 F.2d 504, 507 (8th Cir. 1963); *Tucker* v. *Commissioner*, 55 T.C. 783, 786-88 (1971).

On this reasoning, the temporary nature of Mrs. Hantzis' employment in New York does not affect the outcome of her case. She had no business ties to Boston that would bring her within the temporary employment doctrine. By this holding, we do not adopt a rule that "home" in section 162(a)(2) is the equivalent of a taxpayer's place of business. Nor do we mean to imply that a taxpayer has a "home" for tax purposes only if he is already engaged in a trade or business at a particular location. Though both rules are alluringly determinate, we have already discussed why they offer inadequate expressions of the purposes behind the travel expense deduction. We hold merely that for a taxpayer in Mrs. Hantzis' circumstances to be "away from home in the pursuit of a trade or business," she must establish the existence of some sort of business relation both to the location she claims as "home" and to the location of her temporary employment sufficient to support a finding that her duplicative expenses are necessitated by business exigencies. This, we believe, is the meaning of the statement in *Flowers* that "[b]usiness trips are to be identified *in relation to* business demands and the traveler's business headquarters." 326 U.S. at 474 (emphasis added). On the uncontested facts before us, Mrs. Hantzis had no business relation to Boston; we therefore leave to cases in which the issue is squarely presented the task of elaborating what relation to a place is required under section 162(a)(2) for duplicative living expenses to be deductible.

Reversed.

KEETON, *District Judge*, concurring in the result. Although I agree with the result reached in the Court's opinion, and with much of its underlying analysis, I write separately because I cannot join in the majority's determination that New York was the taxpayer's home for purposes of 26 U.S.C. § 162(a)(2).

In so holding, the majority adopts a definition of "home" that differs from the ordinary meaning of the term and therefore unduly risks causing confusion and misinterpretation of the important principle articulated in this case.

In adopting section 162(a)(2), Congress sought "to mitigate the burden of the taxpayer who, because of the exigencies of his trade or business, must maintain two places of abode and thereby incur additional and duplicate living expenses." *Kroll* v. *Commissioner*, 49 T.C. 557, 562 (1962). *See Rosenspan* v. *United States*, 438 F.2d 905, 912 (2d Cir.), *cert. denied*, 404 U.S. 864 (1971); *James* v. *United States*, 308 F.2d 204, 206-07 (9th Cir. 1962). In the present case, the taxpayer does not contend that she maintained her residence in Boston for business reasons. Before working in New York, she had attended school near her home in Boston, and she continued to do so after she finished her summer job. In addition, her husband lived and worked in Boston. Thus, on the facts in this case, I am in agreement with the majority that the taxpayer's deductions must be disallowed because she was not required by her trade or business to maintain both places of residence. However rather than resting its conclusion on an interpretation of the language of section 162(a)(2) taken as a whole, which allows a deduction for ordinary and necessary expenses incurred "while away from home in the pursuit of trade or business," the majority reaches the same result by incorporating the concept of business-related residence into the definition of "home," thereby producing sometimes, but not always, a meaning of "home" quite different from ordinary usage.

The Supreme Court has noted that "[t]he meaning of the word 'home' in [the predecessor of § 162(a)(2)] with reference to a taxpayer residing in one city and working in another has engendered much difficulty and litigation." *Commissioner* v. *Flowers*, 326 U.S. 465, 471 (1946). The Court has twice rejected opportunities to adopt definitive constructions of the term. *Flowers*, *supra* 326 U.S. at 472; *Commissioner* v.

Stidger, 386 U.S. 287, 292 (1967). *See also Peurifoy* v. *Commissioner*, 358 U.S. 59 (1958). Moreover, as the majority opinion in the present case points out, the courts of appeals have split on whether a taxpayer's "home" is her (or his) principal residence or principal place of business. *See* cases cited at p. 10, *ante*.

The majority enters this conflict among circuits with a "functional" definition of home not yet adopted by any other circuit. I read the opinion as indicating that in a dual residence case, the Commissioner must determine whether the exigencies of the taxpayer's trade or business require her to maintain both residences. *See* pp. 11-13, *ante*. If so, the Commissioner must decide that the taxpayer's *principal residence* is her "home" and must conclude that expenses associated with the secondary residence were incurred "while away from home," and are deductible. If not, as in the instant case, the Commissioner must find that the taxpayer's *principal place of business* is her "home" and must conclude that the expenses in question were not incurred "while away from home." The conclusory nature of these determinations as to which residence is her "home" reveals the potentially confusing effect of adopting an extraordinary definition of "home."

A word used in a statute can mean, among the cognoscenti, whatever authoritative sources define it to mean. Nevertheless, it is a distinct disadvantage of a body of law that it can be understood only by those who are expert in its terminology. Moreover, needless risks of misunderstanding and confusion arise, not only among members of the public but also among professionals who must interpret and apply a statute in their day-to-day work, when a word is given an extraordinary meaning that is contrary to its everyday usage.

The result reached by the majority can easily be expressed while also giving "home" its ordinary meaning, and neither Congress nor the Supreme Court has directed that "home" be given an extraordinary meaning in the present context. *See*

Flowers, *supra*. *Stidger*, *supra*. and *Peurifoy*, *supra*. In *Rosenspan* v. *United States*, *supra*. Judge Friendly, writing for the Court, rejected the Commissioner's proposed definition of home as the taxpayer's business headquarters, concluding that in section 162(a)(2) " 'home' means 'home.' " *Id*. at 912.

> When Congress uses a non-technical word in a tax statute, presumably it wants administrators and courts to read it in the way that ordinary people would understand, and not "to draw on some unexpressed spirit outside the bounds of the normal meaning of words." *Addison* v. *Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 617 (1944).

Id. at 911. *Cf. United States* v. *New England Coal and Coke Co.*, 318 F.2d 138, 142 (1st Cir. 1963) ("Unless the contrary appears, it is presumed that statutory words were used in their ordinary sense").

In analyzing dual residence cases, the majority opinion advances compelling reasons that the first step must be to determine whether the taxpayer has business as opposed to purely personal reasons for maintaining both residences. This must be done in order to determine whether the expenses of maintaining a second residence were, "necessitated by business, as opposed to personal, demands," p. 4 *ante*, and were in this sense incurred by the taxpayer "while away from home in pursuit of trade or business." Necessarily implicit in this proposition is a more limited corollary that is sufficient to decide the present case: When the taxpayer has a business relationship to only one location, no traveling expenses the taxpayer incurs are "necessitated by business, as opposed to personal demands," regardless of how many residences the taxpayer has, where they are located, or which one is "home."

In the present case, although the taxpayer argues that her employment required her to reside in New York, that contention is insufficient to compel a determination that it was the nature of her trade or business that required her to incur the additional expense of maintaining a second residence, the

burden that section 162(a)(2) was intended to mitigate. Her expenses associated with maintaining her New York residence arose from personal interests that led her to maintain two residences rather than a single residence close to her work.[1] While traveling from her principal residence to a second place of residence closer to her business, even though "away from home," she was not "away from home in pursuit of business." Thus, the expenses at issue in this case were not incurred by the taxpayer "while away from home in pursuit of trade or business."

In the contrasting case in which a taxpayer has established that both residences were maintained for business reasons, section 162(a)(2) allows the deduction of expenses associated with travel to, and maintenance of, one of the residences if they are incurred for business reasons *and that abode is not the taxpayer's home*. A common sense meaning of "home" works well to achieve the purpose of this provision.

In summary, the majority announces a sound principle that, in dual residence cases, deductibility of traveling expenses depends upon a showing that both residences were maintained for business reasons. If that principle is understood to be derived from the language of section 162(a)(2) taken as a whole, "home" retains operative significance for determining *which* of the business-related residences is the one the expense of which can be treated as deductible. In this context, "home" should be given its ordinary meaning to allow a deduction only for expenses relating to an abode that is not the taxpayer's principal place of residence. On the undisputed facts in this case, the Tax Court found that Boston was the taxpayer's "home" in the everyday sense, *i.e.*, her principal place of

[1] For reasons explained by the majority, pp. 13-16, *ante*, the temporary nature of her employment does not bring the case within those as to which Congress was mitigating the burden of duplicative expenses when enacting section 162(a)(2).

residence. Were the issue relevant to disposition of the case, I would uphold the Tax Court's quite reasonable determination on the evidence before it. However, because the taxpayer had no business reason for maintaining both residences, her deduction for expenses associated with maintaining a second residence closer than her principal residence to her place of employment must be disallowed without regard to which of her two residences was her "home" under section 162(a)(2).

A-2

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1140.

SOTERIOS AND CATHARINE HANTZIS,
Petitioners, Appellees,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent, Appellant.

Before CAMPBELL, Circuit Judge,
BOWNES, Circuit Judge and KEETON, District Judge.*

ORDER OF COURT

Entered January 28, 1981

It is ordered that the petition for rehearing herein filed on January 21, 1981, be, and the same hereby is, denied.

By the Court:

Clerk.

* Of the District of Massachusetts, sitting by designation.

[cc: Mr. Reidy and Ms.Hantzis.]

T.C. Memo. 1979-299

UNITED STATES TAX COURT

Docket No. 965-78

Filed August 7, 1979

SOTERIOS HANTZIS and CATHARINE HANTZIS, *pro se.*

GARY S. GROSS, for the respondent.

Memorandum Findings of Fact and Opinion

RAUM, *Judge*: The Commissioner determined a $433.31 deficiency in petitioners' 1975 income tax. The only matter in dispute is his disallowance of a $3,406 deduction which had been claimed as "employee business expenses" on petitioners' return, and which relates to travel expenses incurred by Catharine Hantzis in connection with a ten-week trip in the summer of 1975 and a three-day trip in December 1975, both from Boston, Mass., to New York City.

Findings of Fact

Petitioners, husband and wife, have resided continuously in Boston, Mass., since mid-1973. Petitioner Soterios Hantzis is a teacher; in 1975 he was a member of the faculty of Northeastern University in Boston.

Mrs. Hantzis (sometimes hereinafter referred to as "petitioner") is now a lawyer, employed by the Commonwealth of Massachusetts.

Until about mid-1973 and for a number of years prior thereto, Mrs. Hantzis was at the University of California at Berkeley, working towards a Ph.D. degree in philosophy, and in connection therewith was engaged at the same time in part-time teaching in the philosophy department. She was compensated about $4,000 per academic year for her teaching. In 1973 her husband "decided that he wished to return to Boston to settle down," and petitioners then left California. Since that time Mrs. Hantzis has not been gainfully employed teaching philosophy, and the record fails to show whether she did anything further in any substantial way towards obtaining the Ph.D. degree.

In the fall of 1973 Mrs. Hantzis became a full-time student at the Harvard Law School in Cambridge, Mass. During her second year at law school she sought unsuccessfully to obtain employment for the summer of 1975 with a Boston law firm. However, she did succeed in getting a summer job as a legal assistant in a New York law firm, and beginning in June of 1975 she became thus employed by that firm for a ten-week period. Her husband, who had a teaching schedule that summer at Northeastern University, continued to reside at their Boston home, but Mrs. Hantzis rented a small apartment in New York for this period. Her total expenses relating to her New York employment amounted to $3,204, consisting of $124 for transportation between Boston and New York and $3,080 for meals and lodging while in New York. During her summer employment she made at least several trips back to Boston

for personal reasons, but petitioners do not claim any deduction for travel expenses relating to such trips. Her earnings for the ten-week period were $3,750, which were reported on petitioners' 1975 return.

Between December 26, 1975, and December 28, 1975, Mrs. Hantzis attended a convention of the American Philosophical Association in New York City. In connection with that convention she paid expenses totaling $171 for transportation, meals and lodging, and a "convention fee." She maintained a continuing interest in philosophy and had been considering the completion of a draft of a paper in that field which might perhaps be published at some later time. The record fails to establish that any such possible publication would have been productive of any profit or that it was expected to be profitable.

In petitioners' 1975 return they deducted $3,406 as "employee business expenses," which were set forth as $3,212 in respect of the summer employment and an aggregate of $194 in respect of the convention. The Commissioner disallowed these deductions in their entirety.

Opinion

1. *Summer employment expenses.* We hold that Mrs. Hantzis' $3,204 summer employment expenses are deductible under section 162(a)(2), I.R.C. 1954, as "traveling expenses (including amounts expended for meals and lodging . . .) while away from home in the pursuit of a trade or business." The Government's principal challenge to the applicability of section 162(a)(2) here is petitioners' alleged failure to satisfy the "away from home" requirement. It contends that New York

City must be regarded as Mrs. Hantzis' "tax home," with the consequence that she cannot be regarded as having been "away from home" within the meaning of the statute. We disagree.

Plainly, petitioner's ten-week stay in New York was temporary. Cf. *Michaels v. Commissioner*, 53 T.C. 269 (1969). This is not a case where deduction must be disallowed because the taxpayer's residence at his place of work was indefinite in duration (*Kroll v. Commissioner*, 49 T.C. 557 [1968]), nor is this a case where the taxpayer commuted to his place of employment from a residence which he maintained in a remote city merely for his own personal reasons (*Commissioner v. Flowers*, 326 U.S. 465 [1946]), or where he had no "home" to be away from (cf. *Brandl v. Commissioner*, 513 F. 2d 697 [6th Cir. 1975]; *Wirth v. Commissioner*, 61 T.C. 855 [1974]). Petitioner had a bona fide home in Boston (cf. *Rambo v. Commissioner*, 69 T.C. 920, 923 [1978]), and her presence in New York involved at least to some extent the duplication of living expenses for which the statute was intended to afford relief, see *James v. United States*, 308 F. 2d 204, 206 (9th Cir. 1962); *Daly v. Commissioner*, 72 T.C. 190, 195 (1979). Indeed, it would have been unreasonable to expect her to move her permanent Boston home to New York merely because she had a ten-week job in New York — a consideration that has been regarded as significant in determining whether one's "tax home" is the place of employment rather than his permanent residence. *Six v. United States*, 450 F. 2d 66, 69 (2d Cir. 1971); *Kroll v. Commissioner, supra* at 562.

The Government relies heavily upon our decision in *Martin v. Commissioner*, 19 T.C.M. 1216, 29 P-H Memo. T.C. par. 60, 217 (1960), affd. per curiam 295 F. 2d 38 (3d Cir. 1961). There is, to be sure, some similarity between that case and the one now before us. And it is true that we there pointed out that the taxpayer did not regularly carry on a business at the place which he claimed as his home. However, not only must that case be read in the light of such later cases as *Rambo v. Commissioner, supra*, but the taxpayer in *Martin*, who had a permanent residence in Trenton, N.J., had a *series* of temporary jobs over a period of several years in Washington, D.C., which was found to be his tax home. In contrast, petitioner herein had much less extensive contacts with New York City — she was there employed for only a single ten-week temporary period. The distinction may perhaps not be entirely satisfying, but, as was stated by Judge Friendly in a different context: "If the distinction seems fragile, that is not unusual in cases near a frontier, with large hinterlands on either side." *Petschek v. United States*, 335 F. 2d 734, 737 (2d Cir. 1964).

The Government also contends that the deduction must be disallowed because the expenses were not incurred "in pursuit" of business. The point is specious. Of course, the expenses were personal in a sense, but they were necessitated by her employment in New York. Since that employment was temporary, they represented precisely the kind of living costs that section 162(a)(2) was intended to cover.

No. 80-1796

JUN 1 1981
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

SOTERIOS HANTZIS AND CATHARINE HANTZIS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

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SOTERIOS HANTZIS AND CATHARINE HANTZIS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question presented in this federal income tax case is whether the court of appeals correctly held that petitioner Catharine Hantzis, a student at the Harvard Law School during the year in issue, could not deduct under Section 162(a)(2) of the Internal Revenue Code of 1954 (26 U.S.C.) the transportation, food and lodging expenses she incurred while working as a summer law clerk in New York City.

The pertinent facts may be summarized as follows: In 1973, petitioner and her husband[1] moved from California to Boston, Massachusetts. Petitioner's husband obtained a teaching position at Northeastern University in Boston, and in the fall of 1973 petitioner enrolled as a full-time student at the Harvard Law School. During her second year of law

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[1]References to "petitioner" are to Catharine Hantzis. Soterios Hantzis is a party solely because he filed a joint income tax return with his wife for the year at issue.

school, she sought unsuccessfully to obtain employment for the summer of 1975 with a Boston law firm. She therefore obtained a job as a clerk with a law firm in New York City, where she worked for 10 weeks. Her husband remained in Boston during the summer (Pet. App. A-1 at 1-2).

On their joint income tax return for 1975, petitioner deducted the cost of her initial transportation from Boston to New York City, the cost of her return transportation to Boston at the end of the summer, and the cost of her meals and lodging incurred while living in New York. On audit, the Commissioner of Internal Revenue disallowed those deductions, aggregating approximately $3,204, on the ground that they were not incurred away from home in the pursuit of a trade or business within the meaning of Section 162(a)(2) (Pet. App. A-1 at 2).

The Tax Court upheld petitioner's claimed deductions. In so holding, the court relied on the fact that petitioner's employment was expected to last only 10 weeks. It concluded that, for purposes of Section 162(a)(2), her "tax home" was in Boston, and that she was "away from home" within the meaning of the statute. The Tax Court also found that petitioner's summer expenses were incurred in the pursuit of a trade or business (Pet. App. A-3).

The court of appeals reversed. Observing that the meaning of the term "home" in Section 162(a)(2) depends on the facts of each particular case, and that its definition is "not simply pinioned to one of two competing definitions of home" (Pet. App. A-1 at 10, 13), the court of appeals ruled that for purposes of Section 162(a)(2), petitioner's home was in New York City. The court further found that petitioner maintained her residence in Boston solely for personal considerations. It therefore rejected petitioner's argument that the expenses were deductible because her employment was temporary. The court reasoned (Pet. App. A-1 at 15) that the "temporary employment doctrine * * * has no

application where the taxpayer has no business connection with his usual place of residence." Accordingly, the court held that the expenses were not deductible.

1. The court of appeals correctly held that petitioner could not deduct her transportation, lodging and meal expenses incurred while working in New York City. Section 162(a)(2) of the Internal Revenue Code allows a deduction for reasonable and necessary traveling expenses, including amounts expended for meals and lodging, incurred while away from home in the pursuit of a trade or business. *Commissioner* v. *Flowers*, 326 U.S. 465 (1946). Personal expenses, on the other hand, are not deductible. Section 262 of the Code. Cases under Section 162(a)(2) therefore generally turn on the questions (1) whether the expenses were incurred while "away from home," and (2) whether the expenses were incurred in the pursuit of a trade or business.

Here, the court of appeals stated "that the 'while away from home' requirement has to be construed in light of the further requirement that the expense be the result of business exigencies" (Pet. App. A-1 at 11). The court found that petitioner's trade or business did not require that she maintain a home in Boston as well as one in New York City. Her trade or business required her only to maintain a home in New York where she worked, and she maintained her residence in Boston solely for personal reasons. Accordingly, the court correctly concluded that "her home for purposes of section 162(a)(2) was New York and that the expenses at issue in this case were not incurred 'while away from home' " (Pet. App. A-1 at 13). In accord with the decision below, the only other court of appeals that has considered the question whether a full-time college student can deduct summer employment expenses has likewise rejected the taxpayer's claim to an "away from home" deduction under Section 162(a)(2). *Commissioner* v. *Janss*, 260 F. 2d 99 (8th Cir. 1958).

The court of appeals correctly held that the temporary employment doctrine generally has no application where the taxpayer has no business connection with his usual place of residence. Ordinarily, if a taxpayer maintains a home near the location of his regular trade or business and temporarily relocates, the additional expenses incurred as the result of maintaining a second home are deductible. The temporary employment doctrine, however, does not purport to eliminate any requirement that the continued maintenance of a first home must have a business justification. Petitioner never had a business need for maintaining her home in Boston. Her decision to maintain two homes was prompted solely by personal considerations. Accordingly, the temporary duration of her employment in New York has no bearing on the application of Section 162(a)(2).

2. Contrary to petitioner's argument (Pet. 14), the decision below does not conflict with either *Frederick* v. *United States*, 603 F. 2d 1292 (8th Cir. 1979), *Wright* v. *Hartsell*, 305 F. 2d 221 (9th Cir. 1962),[2] or *Harvey* v. *Commissioner*, 283 F. 2d 491 (9th Cir. 1960). Petitioner cites these cases (Pet. 14-15) for the proposition that a trade or business connection with the first home is not necessary to the application of the temporary employment doctrine. But it is clear that the taxpayers involved in those cases had a trade or business near the location of their first home. Indeed, the district court in *Frederick* stated that "a deduction will be allowed under §162(a)(2) only when a taxpayer has an established *principal or usual place of employment* and he incurs travel expenses while temporarily employed elsewhere." 457 F. Supp. 1274, 1280 (D.N.D. 1978) (emphasis added). The scope of the temporary employment exception

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[2]The Ninth Circuit in *Wright* v. *Hartsell, supra*, did not address the temporary employment issue. There, the court allowed a deduction in part because the taxpayer could not live close to the Atomic Energy Commission test site where he worked.

was not squarely addressed in those cases because the taxpayers there had established usual places of employment in the first instance. Thus, those cases are not inconsistent with the decision below.[3]

3. Petitioner further contends that the application of the "away from home" requirement of Section 162(a)(2) and the temporary employment doctrine conflict with *Rosenspan* v. *United States*, 438 F. 2d 905 (2d Cir.), cert. denied, 404 U.S. 864 (1971), and *Six* v. *United States*, 405 F. 2d 66 (2d Cir. 1971). Any differences, however, may be attributed in large part to the divergent facts of each case. As the court of appeals here noted, Section 162(a)(2) must be interpreted on the basis of the particular facts at hand. The Second Circuit has never considered the application of Section 162(a)(2) to summer employment expenses incurred by a full-time student. There is no basis for petitioner's suggestion that the Second Circuit would reach a different result on the facts of this case. Moreover, it is speculation for petitioner to argue that the court below would disagree with the results in *Rosenspan* or *Six* under similar facts.

Finally, petitioner contends (Pet. 19-23) that the decision below will affect many taxpayers, such as performers and construction workers, who were previously allowed deductions for traveling expenses. There is, however, no basis for

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[3]Petitioner's reliance (Pet. 14) on *Burns* v. *Gray*, 287 F. 2d 698 (6th Cir. 1961), is misplaced. That case involved a racehorse starter who maintained a permanent home in Kentucky and traveled around the country during racing season. His expenses were held to be deductible. That case is an example of the many special rules developed in this area to accommodate the diverse businesses of taxpayers. If a taxpayer is required to travel throughout a large geographical area because of his trade or business, it is evident that the taxpayer cannot live near his place of employment. Travel expenses are deductible in such a situation if the taxpayer maintains one home in a relatively central location. The facts of *Burns* are therefore not comparable.

assuming that the opinion of the court of appeals will be extended to taxpayers other than full-time students.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1981